

July 24, 2014

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Acceleration of Broadband Deployment by Improving
Wireless Facilities Siting Policies (WT 13-238); Acceleration of
Broadband Deployment (WC Docket No. 11-59); 2012 Biennial Review
of Telecommunications Regulations (WT Docket No. 13-32)

Dear Ms. Dortch:

On July 22nd, 2014, Raymond Mastroianni and Robert France, CEO and General Counsel, respectively, of Telebeam Telecommunications Corporation, along with undersigned counsel, met with: Commissioner Michael O’Rielly, Amy Bender, Legal Advisor to the Commissioner, and Rachel Cook of the Commissioner’s Office; Valery Galasso, Special Advisor & Confidential Assistant to Commissioner Jessica Rosenworcel; Louis Peraertz, Legal Advisor to Commissioner Mignon Clyburn; Nicholas Degani, Legal Advisor to Commissioner Ajit Pai; and with Chad Breckenridge, Peter Trachtenberg, Donald Johnson, Steven Rosenberg, Patricia Robbins and Angela DeMahy of the Wireless Telecommunications Bureau.

Telebeam explained that its meetings were in response to a set of *ex parte* notices filed by the City of New York regarding meetings held with the Commission on May 27, 2014. The City’s *ex parte* notices disclose that its representatives briefed the Commission as to a Request for Proposals issued by the City’s Department of Information Technology and Telecommunications (DoITT) for a franchise to replace expiring payphone franchises with a franchise for new payphone structures that will include Wi-Fi facilities and “potentially” facilities for additional services, including wireless services. A copy of the City’s RFP is enclosed (without appendices). The City’s *ex parte* notices state that the City “expressed the view that the contemplated facilities would constitute (for purposes of applying Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012) facilities authorized in the City’s proprietary capacity as property owner and location provider, and not as a land use regulator, consistent with the approach which the Commission proposed to adopt at paragraph 129 of the [NPRM]” in this docket.

Telebeam explained that it owns and operates approximately 23% of the payphone locations on the City’s sidewalks, and has operated payphones in the City since 1985. Its purpose in meeting with the Commissioner and staff was to inform the Commission that DoITT previously has made

similar arguments that its regulation of communications service providers is exempt from the Communications Act on grounds that it is acting in its proprietary capacity, and to urge the Commission not to adopt any rule or statement that would allow the City to avoid the application of wireless siting rules ultimately adopted in this proceeding to wireless facilities that may be located in payphone structures on the City sidewalks.

Telebeam explained that in litigation over its wireless siting regulatory activities, DoITT argued that it was exempt from Section 253 of the Communications Act on grounds that its decisions were “exercises of its ‘proprietary authority,’ not its regulatory authority.” *NextG Networks of New York, Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 at *18 n. 9 (S.D.N.Y. Dec. 10, 2004). The court rejected the argument, reasoning that “[t]he scope of the City’s franchising scheme cannot readily be described as ‘narrow’ or as ‘addressing a specific proprietary problem’ where access to three thousand City light poles is at issue.” *Id.* at *19 n. 9.

Likewise, in prior litigation with payphone providers, including Telebeam, DoITT argued that Section 253 did not apply to the City’s regulatory activity with respect to payphones located on the City’s sidewalks because it claimed it was acting in a proprietary capacity, not as a government regulator. *Coastal Communications Services, Inc. & Telebeam Telecommunications Corporation v. City of New York*, 658 F. Supp. 2d 425, 431-432 (E.D.N.Y. 2009). The court found “the City’s argument is meritless,” because it “would undermine the purpose of § 253, which is, if nothing else, to augment those responsibilities so as to obligate state actors not to block free-market entry into the telecommunications field...” *Id.*

Telebeam explained that the City’s claim that its regulation of payphone facilities like Telebeam’s are “in the City’s proprietary capacity as property owner and location provider” is just as wrong as its previous arguments in court. The City controls payphone franchises pursuant to local laws and authorizing resolutions – legislative acts of the City Council. Its control of sidewalks is a classic governmental function, which does not resemble any private party activity. Telebeam urged the Commission not to give DoITT any room to claim that the wireless siting rules adopted in this proceeding do not apply to DoITT’s assertion of control over wireless facilities that are installed in payphone enclosures.

For context, Telebeam provided the Commission with background on its payphone business and the evolution of pay telephones in New York City. In 1995, New York City passed legislation to promote competition in the City’s public telephone market and to end the monopoly Bell Atlantic/Verizon previously enjoyed of payphones located at prominent curbside locations.

Telebeam was among the first and most successful competitive entrants. Telebeam invested \$25 million to build over 17 miles of underground telecommunications and electrical conduit, which provided the infrastructure for the present technologies, as well as the ability to adapt to future technologies. The company installed high quality public telephone enclosures, and connected to the public switched telephone network and electric grid. Telebeam made its mark and clearly distinguished itself from Verizon and other competitors. Telebeam now has approximately 900 such public telephone locations in the City of New York.

Telebeam explained that it has always wanted its payphones to evolve, just as cell phones evolved from purely voice communications to enabling users to communicate by messaging and smartphones, because it has always viewed its competition as coming from any kind of phone service. Telebeam thus proposed to DoITT as early as 2000 that it could install smart payphones, with Internet access. A copy of Telebeam's brochure showing its vision of a smart payphone is enclosed. Inspired by an early Verizon test pilot, as early as 2003 – 2004, Telebeam pressed DoITT for authority to add Wi-Fi hotspots to its enclosures. Yet DoITT refused on grounds it did not have that authority from the City Council. So Telebeam lobbied the City Council, which passed a 2004 amendment to an authorizing resolution, expressly authorizing DoITT to grant payphone operators the authority to offer "web telephones, public internet terminals, Wi-Fi access points and other telecommunications services." A copy of Resolution No. 502 of 2004 is attached. Despite this express authority, DoITT still refused to allow Telebeam to add Wi-Fi and other services to its payphone enclosures.

In 2012, when the City finally wanted to promote Wi-Fi, it allowed Telebeam to install 20 Wi-Fi locations as a test pilot. Telebeam shared with the Commission data showing that these 20 Wi-Fi locations provide substantial communications opportunities to consumers. In one test week, at these 20 locations, almost 2300 consumers logged on and used Telebeam's free WiFi, another 26,500 consumers stayed in range of the service for over 5 minutes, and another 268,000 consumers whose presence registered with the Hot-Spots. The opportunity that Telebeam sought long ago remains tremendous, yet the City has not allowed Telebeam to deliver the service on a commercial basis. And DoITT's current RFP makes clear that the only Wi-Fi and wireless service DoITT will allow to be delivered by public telephone operators will be strictly where and when DoITT allows, and only on terms DoITT prescribes. *See, e.g.*, RFP at 6 (summary of WiFi and other service requirements); RFP at 8 (locations "as directed by" DoITT); RFP at 14 (conditions of Wi-Fi and other telecommunications services).

Telebeam explained that today it faces the loss of its investment and its business because its franchise from the City expires in October 2014, and under the RFP, the City will issue only one franchise. The City will eliminate and prohibit all service providers other than the successful bidder.

Although the RFP states the new franchise will be "non-exclusive," RFP at 29, it leaves no doubt that a *de facto* monopoly will replace the competition that has existed since passage of the Telecommunications Act of 1996. *See, e.g.*, RFP at 6 ("The successful proposer will be required to purchase and take ownership of all of the public pay telephones on the City's streets..."); RFP at 9 ("The City intends to direct the remaining PPT franchisees to sell all existing PPT installations to the new franchisee."). DoITT admits that it intends to pick a single winner, but claims the franchise is "non-exclusive" because the City may, if and when it decides, issue another RFP for more franchises. This tortured interpretation of a "non-exclusive" franchise does not change the fact that upon award, there will be one new franchisee – a monopoly – and Telebeam and others will be prohibited from providing telecommunications services on the public rights of way for an indefinite period of time.

Existing operators, such as Telebeam, that are not the winner will be required to sell their facilities to the new monopolist and exit the market. The purchase price is undefined, but the RFP indicates that it is "fair value" for the above ground assets, with no consideration to be given for the franchise. In essence, if it is not the winner, Telebeam expects to receive offers of pennies on the dollar for assets costing it \$25 million.

Telebeam characterized DoITT's suggestion that Telebeam or others could possibly get franchises in the future as laughable. Telebeam emphasized that no rational entrepreneur or investor would invest \$25 million (or more), have it taken away, and then do it again. This course of action sends a terrible message to technology companies that the City is asking to invest in the public rights of way.

Telebeam noted that it understands one reason DoITT will only authorize a single payphone operator is a belief that a single operator is necessary to obtain City-wide Wi-Fi with seamless transfer of log-on credentials as the user travels from one hot-spot zone to another. Telebeam refuted this concept because existing standards and protocols for Wi-Fi authentication can be shared by a group of Wi-Fi providers. More important, Telebeam explained that if the City had simply not blocked it, Telebeam would have introduced commercial Wi-Fi and other innovative services over 10 years ago.

Telebeam explained it has applied for a franchise and desires to continue operations, including the delivery of Wi-Fi, wireless "small cell" services, and any other communications services that might be delivered from its facilities. Telebeam urged the Commission to avoid the adoption of any statement or rule that would allow the City of New York or DoITT to evade the wireless siting rules ultimately adopted, through claims that its regulation of public telephones is an exercise of proprietary authority or otherwise. The City already has stifled innovation in the use of public payphones to the detriment of consumers, and the Commission should assure that whatever rules it adopts offer the City no additional opportunity to limit the delivery of wireless services from payphone facilities.

Very truly yours,

Robert G. Scott, Jr.

cc:

Commissioner Michael O'Rielly
Amy Bender
Rachel Cook
Valery Galasso
Louis Peraertz
Nicholas Degani

Chad Breckenridge
Peter Trachtenberg
Donald Johnson
Steven Rosenberg
Patricia Robbins
Angela DeMahy